Ranhill Bersekutu Sdn Bhd lwn Ng Chee Wan dan satu lagi

MAHKAMAH TINGGI (KUALA LUMPUR) — PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO R2(4)–25–145 TAHUN 2009
MOHD ZAWAWI H
12 JUN 2011

Undang-Undang Buruh — Pembuangan kerja secara konstruktif — Award gaji kebelakangan — Doktrin mitigasi — Sama ada terpakai dalam kes-kes perhubungan perusahaan — Sama ada responden kedua terkhilaf di sisi undang-undang dan fakta apabila gagal mengambil kira faktor-faktor mitigasi

Undang-Undang Pentadbiran — Semakan kehakiman — Certiorari — Permohonan membatalkan award responden kedua — Pembuangan kerja secara konstruktif — Pemohon secara lateral menetapkan umur persaraan di dalam kontrak pekerjaan responden pertama — Sama ada dilaksanakan selaras dengan undang-undang — Sama ada Ranhill Bhd dan pemohon entiti berlainan — Sama ada 'employee handbook' Ranhill Bhd terpakai kepada responden pertama — Sama ada responden kedua terkhilaf apabila gagal mengambil kira faktor-faktor mitigasi

Permohonan semakan kehakiman ini adalah untuk mendapatkan suatu perintah certiorari bagi membatalkan award yang diberikan oleh Mahkamah Perusahaan ('responden kedua') melalui Award No 255 Tahun 2009 ('award yang dicabar'). Responden pertama, yang berkhidmat sebagai 'senior electrical engineer', mendakwa bahawa beliau telah dibuang kerja secara konstruktif oleh pemohon apabila dua peristiwa berikut berlaku secara berturut-turut: (a) apabila beliau dikehendaki melaporkan diri kepada ketua bahagian mekanikal dan kejuruteraan yang merupakan orang bawahannya; dan (b) apabila pemohon memaklumkan kepada responden pertama melalui surat bahawa umur persaraannya jatuh pada 18 Jun 2004 dan seterusnya beliau dilantik secara kontrak selama enam bulan yang dikebelakangkan pada 18 Jun 2004–17 Disember 2004. Dalam award yang dicabar, responden kedua telah memutuskan bahawa responden pertama telah dibuang kerja secara konstruktif oleh pemohon dan sebagai ganti mengambil kerja semula responden pertama, mengawardkan gaji kebelakangan sebanyak RM21,175 sebulan bagi tempoh 24 bulan. Antara isu-isu penting yang dibangkitkan oleh pemohon ialah: (a) responden kedua telah terkhilaf dari segi undang-undang dan melebihi bidang kuasa apabila ia memutuskan Ranhill Bhd dan pemohon adalah kononnya entiti yang berlainan dan 'employee handbook' Ranhill Bhd tidak terpakai kepada responden pertama walaupun responden pertama langsung tidak mempertikaikannya dan lebih-lebih lagi ianya tidak diplid; dan

(b) responden kedua telah terkhilaf di sisi undang-undang dan fakta apabila gagal mengambil kira faktor-faktor mitigasi. A

Diputuskan, menolak permohonan pemohon dengan kos:

(1) Tidak terdapat keterangan bahawa Lembaga Pengarah pemohon telah bersetuju untuk melaksanakan polisi persaraan terhadap pekerja-pekerjanya. Juga, tidak terdapat keterangan yang boleh dibuat kesimpulan bahawa terdapat pengurusan yang sama ('common management') atau pengarah yang sama ('common directors') antara Ranhill Bhd dan pemohon. Dalam hal demikian, responden kedua telah memutuskan bahawa tidak terdapat keterangan yang mencukupi untuk mengangkat tabir korporat ('to lift the corporate veil') Ranhill Bhd dan pemohon. Justeru, keputusan Lembaga Pengarah Ranhill Bhd tidak mengikat responden pertama (lihat perenggan 22). B C

(2) Terdapat autoriti yang memutuskan bahawa doktrin mitigasi tidak terpakai dalam kes-kes perhubungan perusahaan, antara lain, ialah kes *Taylor's College v Puan Yang Shoo Fooi Nee Lim May Chung & Anor,* Civil Appeal No R8–16–11 of 1987 yang diterima pakai oleh Mahkamah Perusahaan dalam kes *Edaran Otomobil Nasional Sdn Bhd v Neoh Hock Lye, Quah Poh Huat, Lee Cheow Lain* [1990] 1 ILR 163 at p 171. Keputusan kes-kes ini menunjukkan bahawa 'mitigation of damages has no place in industrial law', (lihat juga kes *Great Eastern Mills Bhd v Ng Yuen Ching* [1998] 6 MLJ 214 at p 221) (lihat perenggan 23). D E

(3) Pemohon enggan untuk mengambil kerja semula responden pertama tanpa kehilangan apa-apa faedah atau keistimewaan apabila pemohon secara lateral menetapkan umur persaraan di dalam kontrak pekerjaan responden pertama, sedangkan responden pertama telah lama bekerja dan memberi sumbangan perkhidmatan kepada syarikat/pemohon (lihat perenggan 26). F G

[English summary

This application for judicial review was to obtain a certiorari order to quash the award granted by the Industrial Court ('second respondent') by the Award No 244 of 2009 (the impugned award'). The first respondent who had been in the employment as a senior electrical engineer, alleged that he had been constructively dismissed by the applicant when two of the following incidents took place almost consecutively: (a) when he was required to report himself to the head of the mechanical and engineering section who was his junior; and (b) when the applicant informed the first respondent by a letter that his age of retirement fell on 18 June 2004 and thereafter he was appointed contractually for six months which took effect retrospectively on 18 June 2004–17 December 2004. In the impugned award, the second respondent decided that the first respondent had been constructively dismissed by the applicant and in H I

lieu of reinstatement of the first respondent, awarded backwages of RM21,175 per month for the period of 24 months. Among the main issues raised by the applicant were: (a) that the second respondent had erred in law and exceeded its jurisdiction in deciding that Ranhill Bhd and the applicant were allegedly different entities and the employee handbook of Ranhill Bhd was not applicable to the first respondent although the first respondent did not dispute it at all, more so it was not pleaded; and (b) the second respondent had erred in law and in facts in failing to take into consideration the mitigating factors.

Held, dismissing the apllicant's application with costs:

(1) There was no evidence that the applicant's Board of Directors had agreed to exercise the retirement policy on its employees. Also, there was no conclusive evidence that there was common management or common directors between Ranhill Bhd and the applicant. In the circumstances, the second applicant had decided that there was no sufficient evidence to lift the corporate veil of Ranhil Bhd and the applicant. Hence, the decision of the Board of Directors of Ranhill Bhd did not bind the first respondent (see para 22).

(2) There was authorities that the doctrine of mitigation was not applicable in the cases of industrial relations, inter alia, the case of *Taylor's College v Puan Yang Shoo Fooi Nee Lim May Chung & Anor,* Civil Appeal No R8–16–11 of 1987 which was applied by the Industrial Court in the case of *Edaran Otomobil Nasional Sdn Bhd v Neoh Hock Lye, Quah Poh Huat, Lee Cheow Lain* [1990] 1 ILR 163 at p 171. The decision in these cases showed that 'mitigation of damages has no place in industrial law', (see also the case of *Great Eastern Mills Bhd v Ng Yuen Ching* [1998] 6 MLJ 214 at p 221) (see para 23).

(3) The applicant refused to reinstate the first respondent without loss of any benefits or privilege when the applicant laterally fixed the age of retirement in the employment contract of the first respondent, whilst the first respondent had been in the employment for a long time and was contributing his service to the company/applicant (see para 26).]

Nota-nota

Untuk kes-kes mengenai certiorari, lihat 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) perenggan 280–290.

Kes-kes yang dirujuk

Abd Jalil bin Rahmat v Hj Aman Shah bin Haji Abdul Rashid & Ors [2009] 1 MLJ 60; [2008] 5 CLJ 537, MR (dirujuk)

Brett Motors Leasing Ltd v Welsford [1999] NSJ No 466 (dirujuk)

Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor [2001] 3 MLJ 529; [2001] 3 CLJ 259, MP (dirujuk)

Dr Satwant Singh Gill v Hospital Assunta [1998] MLJU 193; [1998] 4 CLJ 47, MT (dirujuk)
Edaran Otomobil Nasional Sdn Bhd v Neoh Hock Lye, Quah Poh Huat, Lee Cheow Lain [1990] 1 ILR 163, MPh (dirujuk)
Elya Designs Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor [2011] 3 CLJ 929, MT (dirujuk)
Farber v Royal Trust Co [1997] 1 SCK 846, MA (dirujuk)
Great Eastern Mills Bhd v Ng Yuen Ching & Ors [1998] 6 MLJ 214, MT (dirujuk)
HSS Integrated Sdn Bhd v Leow Yew Oun [2004] 5 CLJ 321, MT (dirujuk)
Mac Intyre v Nicols [2004] NSSC 36 (dirujuk)
Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 2 CLJ 501, MR (dirujuk)
Pelangi Enterprises Sdn Bhd v Oh Swee Choo & anor [2004] 4 MLJ 562; [2004] 6 CLJ 157, MT (dirujuk)
Quah Swee Khoon v Sime Darby [2000] 2 MLJ 600; [2001] 1 CLJ 9, MR (dirujuk)
R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, MP (dirujuk)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] MLJU 686; [2010] 8 CLJ 629, MP (dirujuk)
See Teow Chuan & Anor v YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors [2007] 2 MLJ 212; [2007] 2 CLJ 82, MR (dirujuk)
Taylor's College v Puan Yang Shoo Fooi Nee Lim May Chung & Anor, Civil Appeal No R8–16–11 of 1987, MR (dirujuk)
Western Excavating (ECC) Ltd v Sharp [1978] All ER 713, MR (dirujuk)
Western India Automobile Association v The Industrial Tribunal, Bombay & others [1949] 1 LLJ 245, MP (dirujuk)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92, MP (dirujuk)
Workmen of Kettlewell Bullen & Co Ltd v Kettlewell Bullen & Co Ltd [1964] LLJ 146, MP (dirujuk)

Lim Heng Seng (Dymphna Lanjuran dan Mohd Sabry bin Mohd Kassim bersamanya) (Lee Hishammuddin Allen & Gledhill) bagi pihak pemohon.
Ramdhari JBS (P Kuppusamy & Co) bagi pihak responden pertama.

Mohd Zawawi H:

PENDAHULUAN

[1] Ini adalah permohonan semakan kehakiman oleh pemohon untuk suatu perintah certiorari bagi membatalkan award yang diberikan oleh Mahkamah Perusahaan ('responden kedua') melalui Award No 255 Tahun 2009 bertarikh 2 Mac 2009 ('award yang dicabar').

[2] Responden kedua telah memutuskan bahawa responden pertama telah dibuang kerja secara konstruktif oleh pemohon berkuatkuasa pada 29 September 2004 dan sebagai ganti mengambil kerja semula responden pertama, mengawardkan gaji kebelakangan sebanyak RM21,175 sebulan bagi tempoh 24 bulan = RM520,920.

[3] Responden pertama juga ada membuat permohonan semakan kehakiman terhadap sebahagian daripada award yang dicabar atas alasan bahawa responden kedua telah khilaf apabila tidak memerintahkan bayaran pampasan sebagai ganti pengambilan semula kerja (*compensation in lieu of reinstatement*) di samping bayaran gaji kebelakangan (*backwages*) yang telah diawardkan kepada responden pertama. Permohonan ini didaftarkan sebagai R4–25–141 Tahun 2009. Permohonan responden pertama supaya kedua-dua permohonan itu didengar bersama telah dibenarkan pada 12 Mei 2010. Tiada perintah mengenai kos. Walau bagaimanapun, untuk mengelakkan kekeliruan, satu alasan penghakiman berasingan telah disediakan berhubung permohonan R4–25–141 Tahun 2009.

[4] Selepas mendengar hujahan-hujahan lisan peguamcara bijaksana kedua-dua pihak, menimbangkan hujahan-hujahan bertulis dan meneliti kertas-kertas kausa yang difailkan di sini, mahkamah menolak permohonan perayu untuk mendapatkan suatu perintah certiorari bagi membatalkan award yang dicabar dengan kos. Kos ditetapkan sebanyak RM5,000.

FAKTA RINGKAS KES

[5] Fakta yang relevan bagi tujuan permohonan ini bolehlah diringkaskan seperti berikut:

(a) responden pertama telah mula berkhidmat dengan pemohon pada 1 Mei 1982 sebagai 'senior electrical engineer'. Beliau telah bertugas dalam pelbagai kapasiti dan tempat dengan syarikat/pemohon;

(b) responden pertama mendakwa bahawa beliau telah dibuang kerja secara konstruktif oleh pemohon apabila dua peristiwa berikut berlaku secara berturut-turut:

(i) pada 1 September 2004, apabila beliau dikehendaki melaporkan diri kepada Ketua Bahagian Mekanikal dan Kejuruteraan, seorang bernama Selvakumar Krishnan, yang merupakan orang bawahannya; dan

(ii) pada 8 September 2004, apabila pemohon memaklumkan kepada beliau melalui satu surat bahawa umur persaraannya jatuh pada 18 Jun 2004 dan seterusnya beliau dilantik secara kontrak selama enam bulan yang dikebelakangkan pada 18 Jun 2004 sehingga 17

Disember 2004. Permintaan responden pertama kepada perayu untuk menarik balik notis bertarikh 8 September 2004 itu telah ditolak pada 29 September 2004. A

(c) responden pertama menyatakan bahawa beliau mempunyai pengharapan sah ('legitimate expectation') untuk bekerja selama mana beliau sihat di segi fizikal dan mental. Tambahan pula, tidak terdapat peruntukan dalam surat pelantikan/kontrak pekerjaan berhubung dengan umur persaraan. Justeru, responden pertama menyatakan bahawa penetapan umur persaraan secara unilateral ini adalah merupakan satu kelainan/perubahan ('variation') kepada kontrak pekerjaannya; B C

(d) sebaliknya, pemohon menyatakan bahawa responden pertama telah meninggalkan pekerjaannya pada 29 September 2009. Pemohon telah melaksanakan polisi persaraan pada 6 September 2004 dengan memberi enam bulan notis yang dikuatkuasakan secara kebelakangan kepada 18 Jun 2004, iaitu tarikh di mana responden pertama sepatutnya bersara. Notis tersebut diberikan melalui satu surat bertarikh 8 September 2004; D

(e) perayu seterusnya menyatakan bahawa responden pertama mengetahui mengenai umur persaraan berkenaan kerana ia telah ditunjukkan di 'electronic employee's handbook' pemohon pada 1 Julai 2004 dan responden pertama telah menikmati manfaat dan faedah seperti yang diperuntukkan dalam *handbook* tersebut; E

(f) justeru, isu yang perlu diputuskan oleh responden kedua ialah: F

(i) apakah yang menyebabkan responden pertama meninggalkan tugasnya pada 29 September 2009;

(ii) sama ada peruntukan mengenai persaraan pada umur 56 tahun seperti yang terdapat dalam 'electronic employee's handbook 2004' adalah mengikat responden pertama; G

(iii) sama ada responden pertama telah menikmati manfaat/faedah seperti yang diperuntukkan dalam 'electronic employee's handbook 2004'; dan

(iv) sama ada umur persaraan pada 56 tahun adalah adil/wajar. H

(g) dalam award yang dicabar, responden kedua memutuskan isu-isu yang berbangkit seperti berikut:

The court found that when the claimant left the employment of RBSB on 29 September 2004 it was because he had considered the action of the company in implementing a retirement age as a unilateral variation of his contract of employment. There was no mention in any of his letters that he was leaving the employment of RBSB because he had been transferred to the Mechanical and Electrical Department which was headed by his subordinate. I

The court found that the letter dated 8 September 2004 by RBSB to the claimant was a unilateral variation of the contract of employment between the claimant and RBSB. There was no provision in any of his letters of appointment for a retirement age vide CL25.

There was no provision in any of the letters of appointment of the claimant by RBSB that he would be bound by the terms of employment which was provided in the employees handbook. The Industrial Court has decided in numerous cases which were cited earlier that if the claimant has enjoyed any of the benefits conferred by the employer which are contained in an employees' handbook or any other benefits, then any other provisions which are detrimental to the claimant contained in that employees' handbook or scheme of benefits will also bind the claimant. The court followed the decision of the Industrial Court in those cases.

RBSB has failed to prove that the claimant enjoyed any of the increased benefits which were provided in the employee's handbook 2004 of Ranhill such as increase in annual leave of 25 days from 20 days and the reduction of working hours in a week from 41 hours to 40 hours. The court held that the doctrine of approbation and reprobation did not apply in this case as there was no evidence that the claimant had enjoyed any of the benefits conferred by the employees' handbook 2004 of Ranhill.

The court held that the claimant has proved that he was constructively dismissed by RBSB on 29 September 2004 when it refused to withdraw its notice of retirement dated 8 September 2004 …

PENDEKATAN MAHKAMAH

[6] Dalam menimbangkan permohonan ini, pendekatan yang perlu diambil oleh mahkamah telah dijelaskan secara terperinci oleh kes *Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501, apabila Mohd Ghazali Yusoff HMR (sebagaimana beliau ketika itu) menyatakan seperti berikut:

I would think that in dealing with judicial review a judge should have the following principles; inter alia, in the forefront of his mind:

(a) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;

(b) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;

(c) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

(d) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;

(e) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law; and

(f) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

[7] Dalam kes *Abdul Jalil bin Rahmat v Hj Aman Shah bin Haji Abdul Rashid & Ors* [2009] 1 MLJ 60; [2008] 5 CLJ 537, Mahkamah Rayuan menyatakan:

> It cannot be overly emphasised that in a case of this nature, where an aggrieved person seeks a judicial review, he must take cognisance of certain perimeters, namely the limited jurisdiction of a court to disturb the decision of an inquiry, and the evidential burden which the appellant cannot escape from. A court is only interested in the decision making process. It is not the court's duty to consider whether the decision is fair and reasonable, but merely to scrutinise the process leading to that decision. Its own view takes a back seat and may not substitute the decision as regards the appropriate penalty for the appellant's misconduct.

[8] Dalam kes *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] MLJU 686; [2010] 8 CLJ 629 Raus Sharif HMP menyatakan di ms 639:

(18) The Court of Appeal has in number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 CLJ 235, National Union of *Plantation Workers v Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681, *Quah Swee Khoon v Sime Darby Bhd* [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong & Another Appeal* [2001] 3 CLJ 9. However, there are exceptions to this restrictive principle where:

(a) Reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality; or

(b) There is no evidence to support the conclusion reached

(see *Swedish Motor Assemblies Sdn Bhd v HJ Mohd Ison Baba* [1998] 3 CLJ 288).

(19) It is clear from the above authorities that the scope and ambit of Rama

> Chandran had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review.

[9] Pendekatan yang sama telah dipakai di bidang kuasa Commonwealth yang lain, contohnya, Kanada. Dalam kes *Brett Motors Leasing Ltd v Welsford* [1999] NSJ No 466 (NSSC), Saunders J menyatakan di perenggan 14:

> 14. One should bear in mind that the jurisdiction of this court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. 'Error of law' is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[10] Dalam kes *Mac Intyre v Nicols* [2004] NSSC 36, Le Blanc J berkata di perenggan 25:

> 25 I adopt the analysis of Saunders J in *Brett*, and find that before I can overturn the adjudicator's decision, there has to be a clear error on her part. In other words, the appellant must show that the adjudicator misinterpreted documents or other evidence that there was no evidence to support the conclusions reached, that she clearly misapplied the evidence in a material respect thereby producing an unjust result or that she failed to apply appropriate legal principles to proven facts. Only in such an instance, could I overturn the decision of the adjudicator.

KEPUTUSAN MAHKAMAH

[11] Dalam kes ini, adalah tidak dipertikaikan bahawa responden pertama telah memplidkan pembuangan kerja secara konstruktif pada 29 September 2004 apabila perayu enggan menarik balik melalui surat bertarikh 8 September 2004 yang memaklumkan tentang penetapan 56 tahun sebagai umur persaraan yang terpakai kepada responden pertama dan seterusnya pemohon

melantik beliau secara kontrak selama enam bulan yang dikebelakangkan kepada 18 Jun 2004–17 Disember 2004.

[12] Keterangan responden pertama yang relevan mengenai perkara ini adalah terdapat dalam pemeriksaan balas beliau seperti berikut:

Q: The 1st letter to the company notifying that there is breach.

A: Yes.

Q: What is the breach.

A: The breach is unilaterally imposing a retirement policy.

Q: The breach is the introduction of retirement age.

A: Yes. Retirement policy.

Q: Why is particular retirement age.

A: My letter was in response to company letter dated 8 September 2004. Company's retirement policy. Their instruction I had retired on 18 June 2004.

Q: Current policy of Ranhill Bhd retirement age 56 years.

A: I am not aware of the existence of the policy until I received the letter of the company dated 8.9.2004.

Q: When you wrote CL–29 to the company, your reason stated in CL–29 for claiming CD was due to the imposition of a new retirement policy.

A: That is the main reason. I stated in my letter.

Q: Same.

A: A retirement policy.

Q: Backdating of contract.

A: Yes.

Q: The company has resolved the issue which you made claim CD.

A: *NO*

Q: Why didn't you follow the instruction since the company had already addressed the issue of retraction of the letter of 8.9.2004.

A: The instruction came *after* I had claimed CD. They have *not* resolved the issue on retirement policy. I was informed I.R Department to wait for them to call for a meeting.

Q: When you claim CD, what are you seeking.

A: *Reinstatement. Withdrawal of company policy. Retract the imposition of retirement policy on my retirement. To reinstatement me as V.P and as head of department.*

Q: Your last letter to the company. The company has already given you the remedy of reinstatement before going to the I.R Department.

A: *NO*

Q: If there was no retirement policy at the time you joined the company is it not possible for the company to introduce it at a later stage.

A: It is possible *provided* it was made known to the parties and agreed.

Q: When you claimed CD on 29.9.2004, the only breach you mentioned in your letter is with regard to the imposition of an retirement policy…6 months contract backdated to 18.6.2000. Two reasons in CL-29.

A: Yes. There was another reason.

Q: When the company had addressed both these issues and rectified this vide letter dated of 11 October 2004, CO-46 and 19.10.2004, CO-47, was there anymore breach.

A: They did *not* address the issue of imposing the new retirement policy *unilaterally*.

[13] Dalam pemeriksaan semula, responden pertama memberi keterangan seperti berikut:

Q: Did you report.

A: NO. Retirement policy *not resolved*. If went back to work, I would have *condoned* retirement policy.

Q: CO-47. Bundle C, page 27.

A: Company stated that there is a retirement age of 60 years. Unilaterally imposition of retirement policy not resolved. (Penekanan ditambah.)

[14] Adalah jelas bahawa berdasarkan keterangan di atas, responden pertama menyatakan beliau dibuang kerja secara konstruktif pada 29 September 2004 apabila pemohon secara unilateral telah menetapkan 56 sebagai umur pesaraan dan menguatkuasakan kebelakang secara unilateral selama enam bulan. Mahkamah ini bersetuju dengan penemuan oleh responden kedua bahawa perbuatan tersebut adalah merupakan suatu kemungkiran terma-terma dan syarat-syarat pekerjaan yang telah termeterai antara responden pertama dan perayu semenjak 1 Mei 1982.

[15] Terdapat nas dan autoriti undang-undang bagi menyokong keputusan yang dibuat oleh responden kedua bahawa jika tidak terdapat klausa mengenai persaraan dalam surat perlantikan, penetapan umur persaraan secara unilateral oleh pemohon tentunya akan mengubah terma-terma dan syarat-suarat kontrak pekerjaan yang mengakibatkan kemungkiran *fundamental* kontrak pekerjaan itu sendiri.

[16] Antara nas-nas dan autoriti-autoriti ialah seperti berikut: A

(a) *Dr Satwant Singh Gill v Hospital Assunta* [1998] MLJU 193; [1998] 4 CLJ 47 di ms 53 Mahkamah Tinggi memutuskan:

> … Oleh itu perjanjian pada tahun 1970 adalah suatu pejanjian yang jelas dan nyata bahawa pemohon boleh bekerja dengan responden sampai bila-bila masa melainkan pemohon tidak berupaya, berhenti secara sukarela ataupun meninggal dunia … B

Pada ms 54:

> … Responden tidak boleh mengubah perjanjian tersebut tanpa persetujuan pemohon. Percubaan responden untuk mengubah persetujuan pemohon telah gagal … C

(b) *HSS Integrated Sdn Bhd v Leow Yew Oun* [2004] 5 CLJ 321, 325, Mahkamah Tinggi memutuskan: D

> It was clear to me that the learned chairman had a basis for making those findings. the fact that the policy as to the retirement age was not implemented upon the publication of the staff handbook, coupled with the terms of the memorandum of 17 December, provided a basis for finding that the retirement age was imposed by the board of directors through the memorandum and not by the staff handbook. As to knowledge of the contents of the staff handbook the evidence of the applicants' chief executive officer in the Industrial Court was that when it was being prepared the respondent was not consulted. After it was prepared, copies were not given to each employee. Only heads of departments were given a copy. It was only assumed that employees would have been informed of its contents by their heads of departments. There was really no evidence that the respondent actually knew of its contents. As to the claims for benefits, it is true that there was no evidence that the respondent made those claims pursuant to the staff handbook. It was only assumed that because he had made claims for benefits provided for in the staff handbook, he was aware that he made them pursuant to it. In this connection I noted that the respondent was not cross-examined as to this. E F G

(c) *Pelangi Enterprises Sdn Bhd v Oh Swee Choo & anor* [2004] 4 MLJ 562 di ms 575; [2004] 6 CLJ 157 di ms 165, Mahkamah Tinggi memutuskan: H

> In this regards, the Industrial Court was satisfied that the first respondent had succeeded in proving the above two elements. The Industrial court was satisfied that the applicant's conduct was a serious breach of her contract of employment when the applicant had purported to retire the first respondent on reaching 55 years of age, in the absence of any retirement age of 55 years in her contract of employment. The Industrial court said at para 21 of the award as follows: I

In regard to para 20(a)–(b), the court finds that the company, in purporting to *unilaterally* retire the claimant at 55 years in the *absence* of an express term allowing the company to do so, did commit a breach of the claimant's contract of employment. The court finds this breach to be a fundamental breach going to the root of the contract. To retire an employee in breach of contract is to deprive that employee of his right to continue to earn a living. As enunciated by the Court of Appeal in the case of *Hong Leong Equipment Sdn Bhd v Liew fook Chuan* [1996] 1 MLJ 481 at p 510 per Dato Gopal Sri Ram:

> Suffice to say that the expression 'life' appearing in art 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.
>
> The Industrial court was also satisfied that the first respondent had left the applicant's service in response to the aforesaid breach by the applicant and had acted at the appropriate time … (Penekanan ditambah.)

(d) *See Teow Chuan & Anor v Yam Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors* [2007] 2 MLJ 212 at p 216; [2007] 2 CLJ 82 di ms 92.

Isu di hadapan mahkamah ialah sama ada defendan kelima melalui resolusi Lembaga Pengarah pada 31 Mac 1999 boleh menghendaki plaintif bersara atas alasan beliau telah mencapai umur 55 tahun, iaitu satu peristiwa yang berlaku pada tiga tahun yang lepas.

Mahkamah Rayuan memutuskan:

> In the first place, as we have already said, it was neither an express nor an implied term of the first plaintiffs contract with the fifth defendant that he shall retire on attaining 55 years of age. In the second place, (again, as we have already observed) on the material presented to the court below it was plainly a term of the first plaintiff's contract that he shall serve as managing director for as long as he is willing and able to perform his duties. That is why he was permitted without any protest from any quarter to continue to serve as managing director even after he had attained 55 years of age …

Seterusnya di ms 90, Mahkamah Rayuan menyatakan:

> … In the fourth place, the resolution *cannot* as a matter of law have *retrospective effect* so as to compel the plaintiffs to retire. In this context, we would refer to two authorities. In *Guest, Keen, Williams Private Ltd v PF Sterling* [1956] SC 1279 an employer had for the first time introduced into its employment scheme a condition of service that its workman shall retire at 55 years of age. It was held by the Supreme Court of India that the new condition of service could not apply to employees who had been in employment prior to the introduction of then new term. In the course of his judgment, Gajendragadkar J accepted the argument of the affected workmen that it was unfair and unreasonable to apply the new condition as to retirement to them. That, of course, was a case decided by the application of principles of industrial law and equity: hence the use of the phrase 'unfair and unreasonable' in the judgment of Supreme Court. (Penekanan ditambah.)

[7] In *Workman of Kettlewell Bullen & Co Ltd v Kettlewell Bullen & Co*

[1964] LLJ 146, rules of retirement were introduced by the employer in 1947 and again in 1951. The Supreme Court of India said:

Our conclusion is that the rules of retirement at 55 framed in 1947 and 1951 do not apply to the prior employees of the company. It is clear that prior to 1947 there was no rule or condition of service as regards the age of retirement and workmen were allowed to continue as long as they remained fit.

[8] But the common law is far stricter than principles of industrial law and equity. An attempt by a party to a contract to unilaterally introduce a new term into it is regarded as a breach of contract. This is because it amounts to 'an intimation of an intention to abandon and altogether to refuse performance of the contract' as it stands: See *Freeth v Burr* LR CP 213, per Lord Coleridge. And this is precisely the case before us …

[17] Berdasarkan keputusan kes-kes di atas dan memakainya kepada fakta serta keadaan yang wujud dalam kes ini, adalah nyata bahawa pemohon telah memungkiri terma-terma dan syarat-syarat *fundamental* kontrak pekerjaan antara syarikat dan responden pertama. Justeru, adalah wajar bagi responden pertama memplidkan pembuangan kerja secara konstruktif.

[18] Konsep pembuangan kerja secara konstruktif telah dijelaskan dalam banyak kes, antara lain, *Western Excavating (ECC) Ltd v Sharp* [1978] All ER 713 di ms 717; *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, *Quah Swee Khoon v Sime Darby* [2000] 2 MLJ 600; [2001] 1 CLJ 9, *Elya Designs Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor* [2011] 3 CLJ 929.

[19] Dalam nada dan irama yang sama, Mahkamah Agung Kanada telah mentakrifkan definasi pembuangan atau pemberhentian kerja secara konstruktif di dalam kes *Farber v Royal Trust Co* [1997] 1 SCK 846, di perenggan 24 seperti berikut:

A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

[20] Responden kedua tidak mengarahkan responden pertama diambil bekerja semula kerana apabila beliau memberi keterangan di Mahkamah

Perusahaan dalam tuntutan ini pada 28 Disember 2006, umurnya sudah mencapai 58 tahun. Dan apabila responden kedua menurunkan award yang dicabar, umurnya telah melepasi 60 tahun. Oleh itu, responden kedua telah mengawardkan gaji kebelakangan sebanyak RM520,920 (RM21,705 x 24 bulan).

[21] Peguamcara bijaksana pemohon telah menimbulkan beberapa isu bagi menyokong gesaan beliau bahawa award yang dicabar wajar diketepikan. Mahkamah tidak bercadang untuk membincangkan isu-isu tersebut satu per satu. Antara isu-isu penting yang dibangkitkan ialah:

(a) responden Kedua telah terkhilaf dari segi undang-undang dan melebihi bidang kuasa apabila ia memutuskan Ranhill Bhd dan pemohon adalah kononnya entiti yang berlainan dan 'employee handbook' Ranhill Bhd tidak terpakai kepada responden pertama walaupun responden pertama langsung tidak mempertikaikannya dan lebih-lebih lagi ianya tidak diplid;

(b) responden kedua telah khilaf di sisi undang-undang dan fakta apabila gagal mengambil kira faktor-faktor mitigasi sepertimana yang diperuntukkan oleh Mahkamah Persekutuan dalam kes *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor* [2001] 3 MLJ 529; [2001] 3 CLJ 259; dan

(c) keputusan responden kedua tidak masuk akal (*perverse*) dan/tidak tidak munasabah dalam erti kata tiada tribunal dalam keadaan yang serupa akan mencapai keputusan yang sama. Responden kedua gagal untuk mengambil kira fakta bahawa responden pertama telah gagal untuk melaporkan diri untuk bertugas walaupun surat bertarikh 8 September 2004 telah ditarik balik oleh pemohon dan usia persaraan pemohon dan juga pekerja-pekerja lain telah dilanjutkan ke 60 tahun. Sebaliknya, menerima fakta dan memutuskan bahawa umur persaraan pemohon adalah 60 tahun.

[22] Berhubung dengan isu (a), melihat kepada award yang dicabar yang relevan kepada isu ini (lihat ms 483–484, eksh 'RS20'), tidak terdapat keterangan bahawa Lembaga Pengarah pemohon telah bersetuju untuk melaksanakan polisi persaraan terhadap pekerja-pekerjanya. Juga, tidak terdapat keterangan yang boleh dibuat kesimpulan bahawa terdapat pengurusan yang sama ('common management') atau pengarah yang sama ('common directors') antara Ranhill Bhd dan pemohon. Dalam hal demikian, responden kedua telah memutuskan bahawa tidak terdapat keterangan yang mencukupi untuk mengangkat tabir korporat ('to lift the corporate veil') Ranhill Bhd dan pemohon. Justeru, keputusan Lembaga Pengarah Ranhill Bhd tidak mengikat responden pertama.

[23] Berhubung dengan isu (b), terdapat autoriti yang memutuskan bahawa doktrin mitigasi tidak terpakai dalam kes-kes perhubungan perusahaan, antara lain, ialah kes *Taylor's College v Puan Yang Shoo Fooi Nee Lim May Chung & Anor*, Civil Appeal No R8–16–11 of 1987 yang diterima pakai oleh Mahkamah Perusahaan dalam kes *Edaran Otomobil Nasional Sdn Bhd v Neoh Hock Lye, Quah Poh Huat, Lee Cheow Lain* [1990] 1 ILR 163 di ms 171. Keputusan kes-kes ini menunjukkan bahawa 'mitigation of damages has no place in industrial law' (lihat juga kes *Great Eastern Mills Bhd v Ng Yuen Ching* [1998] 6 MLJ 214 di ms 221).

[24] Berhubung dengan isu (c), ia harus dilihat dalam konteks pertelingkahan yang berlaku antara responden pertama dan pemohon. responden pertama membantah penetapan umur persaraan secara unilateral dan keenganan pemohon untuk menarik balik surat bertarikh 8 September 2004. Oleh itu, jika responden pertama kembali bekerja semula seperti yang diminta oleh pemohon, ini bermakna beliau memaafkan/membiarkan kemungkiran yang berlaku ('condoned the breach').

[25] Melihat kepada kedudukan responden pertama dalam keadaan tersebut, persoalan yang berbangkit ialah sama ada terdapat keikhlasan di pihak pemohon untuk mengambil kerja semula responden pertama. Dengan hormat, pelawaan tersebut bukan merupakan satu usaha pengambilan kerja semula secara ikhlas. Keterangan responden pertama yang relevan ialah seperti yang terdapat dalam pemeriksaan balas yang berikut:

> Q: When you claim CD., what are you seeking.
>
> A: Reinstatement. Withdrawal of company policy. Retract the imposition of retirement policy on my retirement. To reinstate me as C.P. and as head of department.

[26] Pemohon enggan untuk mengambil kerja semula responden pertama tanpa kehilangan apa-apa faedah atau keistimewaan apabila pemohon secara lateral menetapkan umur persaraan di dalam kontrak pekerjaan responden pertama, sedangkan responden pertama telah lama bekerja dan memberi sumbangan perkhidmatan kepada syarikat/pemohon.

[27] OP Malhotra dalam bukunya, *'Malhotra — the Law of Industrial Dispute'*, Vol 2, Edisi Keenam, menyatakan di ms 1367–1368 seperti berikut:

> Relief of reinstatement is on the same footing as relief of restitution. Reinstatement means restoration of a dismissed or discharged workmen to his original post. *Upon an Order of reinstatement, the employee concerned is entitled to be put back in the same position as if he had never been dismissed or discharged, together with all the backpay, allowances and other privileges. In other words, the effect of an award of reinstatement is to restore the employee to his former position and status setting aside the order of*

A *termination of service, as if it had never passed and the employee gets the benefit of continuity of service. Reinstatement, therefore requires that the ex-employee should be restored to his previous position so far as his capacity status and emoluments are concerned. Hence an employee on being reinstated, would be entitled to notional promotion which he could have got if his service had not been terminated.* (Penekanan ditambah.)

B

[28] Mahkamah Persekutuan India di New Delhi dalam kes *Western India Automobile Association v The Industrial Tribunal, Bombay & Others* [1949] 1 LLJ 245 memutuskan di ms 256 laporan seperti berikut:

C

… This relief of reinstatement is on the same footing as a relief of restitution. Restitution can be granted integrum in certain cases. *All that is required is that the ex-employee should be restored to his previous position so far as capacity, status and emoluments are concerned and there is nothing extraordinary in such restoration being ordered when considered necessary in the interests of peaceful settlement of industrial disputes.* (Penekanan ditambah.)

D

[29] Selepas meneliti award yang dicabar dengan secara keseluruhan, mahkamah tidak mendapati ia tergolong dalam kategori 'illegality' atau 'irrationality' seperti yang dihuraikan dalam kes *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (MP) yang mewajarkan perintah certiorari diberikan melalui semakan kehakiman.

E

[30] Sebelum mahkamah membuat kesimpulan, barangkali suai-manafaat jika dipetik MP Jain, dalam bukunya *'Administrative Law of Malaysia and Singapore'*, Edisi Ketiga, di ms 714–715 seperti berikut mengenai fungsi mahkamah yang mendengar permohonan semakan kehakiman:

F

The courts have emphasised time and again that certiorari should not be used by way of a disguised appeal from findings of fact. The courts have thus laid down the norm that they would not interfere with the findings of fact by a body unless the same are completely unsupported by any evidence. This is known as the 'no-evidence' rule. A finding having no evidence to support it is characterised as a 'perverse' finding of fact; it is regarded as an error of law and is quashed. If, however, there is some evidence to support a finding of fact, the courts do not interfere with it.

G

H

The courts do not regard it as their function to interfere with the findings of fact by a body merely because of insufficiency or in adequacy of evidence.

The courts have evolved such a restrictive rule to review facts as they want to give the tribunals enough leeway to decide cases entrusted to them for disposal. Too much interference with them may take away the advantages, and the rationale, of tribunal adjudication. But, at the same time, these bodies cannot be left completely uncontrolled lest they should act in an arbitrary manner. Therefore, the 'no-evidence' rule has been evolved to impose a limited judicial review on facts decided by them.

I

If there is some evidence to support a finding of fact, it is not then for the courts to go into the sufficiency o adequacy of the evidence. It is not the court's function to review, reassess, reappreciate, reappraise evidence, or draw its own inferences as to facts from the evidence. The court will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence. The court has to take the evidence as it stands and not go into the question of its reliability in a petition for certiorari.

[31] Dengan hormat, pemohon telah gagal untuk menunjukkan kepada mahkamah bahawa responden kedua telah khilaf di sisi undang-undang dan/atau melebihi bidang kuasanya dalam membenar award yang dicabar yang memerlukan campurtangan mahkamah untuk mengeluarkan perintah certiorari melalui semakan kehakiman.

[32] Pemohonan ini didapati tidak bermerit dan ditolak dengan kos. Kos ditetapkan sebanyak RM5,000.

Permohonan pemohon ditolak dengan kos.

Dilaporkan oleh Ashgar Ali Ali Mohamed